

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Plaintiff,

v.

TOWN OF LIMA and DAVID KYLE,
in his official capacity as Town Board Chair,

Defendants.

ORDER

13-cv-187-bbc

Plaintiff Enbridge Energy, Limited Partnership is an owner of several crude oil pipelines that run through the town of Lima, Wisconsin. It has filed a complaint in which it alleges that the federal government is requiring it to inspect a number of “anomalies” detected in the Lima portion of the pipeline and that defendants Town of Lima and David Kyle are preventing it from performing the inspections within the deadlines imposed by the federal government. Plaintiff says that it may be subject to federal criminal penalties if it does not comply with these deadlines, the earliest of which is May 1, 2013.

Plaintiff has filed a motion for a preliminary injunction to stop defendants “from interfering with [plaintiff]’s use of roads in the Town of Lima during the pendency of this action.” Plt.’s Mot., dkt. #3, at 2. A hearing on plaintiff’s motion is scheduled for March 22.

My preliminary review of plaintiff’s brief raises questions that plaintiff does not

answer. Plaintiff relies solely on 28 U.S.C. § 1331 as a basis for jurisdiction, which gives district courts authority to hear “civil actions arising under” federal law. However, the first argument plaintiff raises in its brief is that defendants “do not have authority” under *state* law to impose the conditions that they have. Plt.’s Br., dkt. #4, at 8-11. Although plaintiff also argues that federal law “preempt[s] defendants’ interpretation and application of Wis. Stat. § 349.16,” *id.* at 11, presumably I would not need to consider this argument if I concluded that defendants had no authority under § 349.16 to act as they did. Thus, plaintiff’s claim could be resolved on state law grounds without ever considering the preemption question.

Considering the state law question first makes sense in light of the canon that “federal courts are supposed to do what they can to avoid making constitutional decisions, and strive doubly to avoid making unnecessary constitutional decisions.” ISI International, Inc. v. Borden Ladner Gervais LLP, 256 F.3d 548, 552 (7th Cir. 2001). However, it raises a jurisdictional question because I cannot decide a state law claim under § 1331. Although 28 U.S.C. § 1367 allows a federal court to exercise supplemental jurisdiction over a state law claim if it shares “a common nucleus of operative fact” with a federal claim in the same lawsuit, Wisconsin v. Ho-Chunk Nation, 512 F.3d 921, 936 (7th Cir. 2008), there is a question whether the state law claim is truly “supplemental” when the entire lawsuit could be resolved under state law. Under § 1367(c)(2), a court may decline to exercise supplemental jurisdiction when the state law claim “substantially predominates over the” federal law claim. There may be an argument that the state law issue “predominates” over

the federal claim because the federal claim will become moot if plaintiff succeeds as a matter of state law.

A related question is whether the court should abstain from deciding plaintiff's federal constitutional claim in accordance with Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). "The Supreme Court has applied Pullman abstention where the preemptive effect of a federal law could have been avoided or limited by a narrow interpretation of the state statute." Time Warner Cable v. Doyle, 66 F.3d 867, 884 (7th Cir. 1995) (citing Lake Carriers' Association v. MacMullan, 406 U.S. 498, 512 (1972)). See also Mazanec v. North Judson-San Pierre School Corp., 763 F.2d 845, 847 (7th Cir. 1985) ("The main purpose of the Pullman doctrine is to avoid, if possible, declaring a state statute unconstitutional, by giving the state courts a chance to interpret it narrowly."). Pullman abstention may be appropriate "even in the absence of a pending state action." In re Zurn, 290 F.3d 861, 868 (7th Cir. 2002).

Because both of these questions could have an effect on the scope of the hearing, I will give the parties an opportunity to address them.

ORDER

IT IS ORDERED that

1. Plaintiff Enbridge Energy, Limited Partnership may have until March 21, 2013 at 12:00 p.m. to file a brief addressing the following questions: (1) whether the court should abstain from deciding plaintiff's federal law claims under Railroad Commission v. Pullman

Co., 312 U.S. 496 (1941); and (2) whether the court has authority to decide the state law issues raised in plaintiff's motion for a preliminary injunction.

2. Plaintiff is directed to serve a copy of this motion on defendants Town of Lima and David Kyle by 5:00 p.m. today, along with their complaint and motion (if the latter documents have not been served already). If they wish, defendants may address the issues raised in this order when filing their response to plaintiff's motion.

Entered this 18th day of March, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge